MESSRS ROLAND CHENG & CO

v.

KONKAMAJU SDN BHD

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
AZHAR MA'AH JCA
ABDUL AZIZ RAHIM JCA
[CIVIL APPEAL NO: S-02-3085-2011]
17 MAY 2012

CONTRACT: *Privity - Sale and purchase agreement - Vendor failed to deliver title deed to purchasers - Titled deed deposited by landowner with solicitors - Failure to settle legal fees due and owing to solicitor by landowner - Whether solicitors could retain title deed pending payment of solicitor's bill - Whether vendor could compel solicitors to deliver title deed - Whether solicitors privy to sale and purchase agreement - Whether vendor had cause of action against solicitors for failure to deliver title deed*

LEGAL PROFESSION: *Remuneration - Lien - Solicitor's lien - Failure to settle legal fees due and owing to solicitor by client - Whether solicitors had right to retain client's document and property pending payment of solicitor's bill - Instruction by client to release title deed - Whether client's obligation to pay legal fees absolved*

This was an appeal by the appellant/third party against the decision of the High Court allowing the respondent's/defendant's claim to compel the appellant to produce and deliver the title deed to the purchasers/plaintiffs. The purchasers had purchased a property from the respondent and had paid the full purchase price of the property to the respondent. However, the respondent had failed to deliver the document of title to the property to the purchasers and hence, the purchasers commenced a suit, the subject matter of the present appeal, to compel the respondent to deliver the document of title to the property to the purchasers. In the same suit, the respondent took out a third party notice against the appellant/third party to compel the latter to produce and deliver the title deed to the property to the purchasers. In its claim against the appellant, the respondent contended that the landowner had instructed the appellant to release all the titles held by the appellant as solicitors for the landowner to the

A respondent's solicitors, which the appellant did except for two titles, one of which was the original title deed to the property. In their defence to the respondent's third party's notice and claim, the appellant contended that the landowner had deposited the title deed to the property with the appellant, who was the B landowner's solicitors, pending the resolution of a suit ('the OS') between the respondent and the landowner. It was thus the appellant's contention that the appellant had solicitor's lien over the title deed until the legal fees due and owing to the appellant by the landowner were fully paid. The appellant subsequently filed C an interpleader summons seeking, *inter alia*, an order that the respondent pay the legal fees in order to discharge the appellant solicitor's lien on the title deed. The interpleader summons was dismissed by the Deputy Registrar and there was no appeal against the decision. The issues to be determined in the appeal D were: (i) whether the appellant had a solicitor's lien over the document of title; and (ii) whether the appellant was estopped from claiming a solicitor's lien over the document of title and accordingly *res judicata* applied to the appellant in the light of the Deputy Registrar's decision dismissing the appellant's interpleader E summons.

Held (allowing appeal and setting aside High Court order with costs)

Per Abdul Aziz Rahim JCA delivering the judgment of the F court:

(1) The appellant could claim a solicitor's lien over the title deed to the property which was in their possession. That was the only way the appellant could protect its interest with regard to the payment of its legal fees by the landowner for the G services rendered to the landowner at the latter's request in particular in relation to the OS. This was particularly so when the title deed was still registered in the name of the landowner. The respondent had not compelled the landowner to deliver the title deed even though it claimed that the OS H was amicably settled and, in the absence of rebuttal submission by the respondent, it must be true. (para 24)

(2) At common law, a solicitor has a right or lien to retain the property in his possession until he is paid costs due to him in I his professional capacity. The provision in s. 55 of the Advocates Ordinance (Sabah Cap. 2) also allowed for a

solicitor in Sabah to have a lien over a document of title belonging to a client until his legal fees are fully paid. The trial judge, having failed to consider these facts, was wrong in his ruling that the appellant could not claim solicitor's lien over the title deed of the property (*Zulpadli & Edham v. Inai Offshore & Marine Engineering Sdn Bhd*, foll) (paras 25-29).

(3) There was no decision on the merits of the appellant claim of solicitor's lien on the title deed made by the Deputy Registrar in dismissing the appellant's interpleader summons. Therefore the learned High Court Judge had fallen into error when he concluded that the appellant could not claim a solicitor's lien over the title deed to the property as it was *res judicata* by reason of the Deputy Registrar's decision. (para 34)

(4) The instruction given by the landowner to their solicitors, the appellant, to release the title deeds did not absolve the landowner's obligation to pay the appellant its legal fees and disbursement cost for the services rendered. As the law stands, a solicitor is entitled to have a lien on his client's documents until his legal fees and costs are paid in full. Further, the solicitor's lien claimed by the appellant on the title deeds was possessory in nature and therefore, the appellant would have lost its possessory lien on the title deeds if the appellant was to part with the title deed as instructed by the landowner. (paras 36, 39 & 40)

(5) The appellant was never a party to the agreement or deed of assignment between the landowner and the developer or the sale and purchase agreement between the defendant and the purchasers. In absence of any privity of contract between the appellant and the respondent, the respondent had no right to demand the production and custody of the title deed to the property. Hence, the respondent had no cause of action against the appellant for the release and surrender of the title deed to the property. Although there was an instruction by the landowner to the appellant to release the title deed, the respondent could not ride on the instruction in order to have a cause of action against the appellant unless the landowner was also named as a party to the claim against the appellant. (para 42)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan oleh perayu/pihak ketiga terhadap keputusan Mahkamah Tinggi dalam membenarkan tuntutan responden/defendan menggesa perayu mengemukakan dan menyerahkan surat ikatan hak milik kepada pembeli-pembeli/plaintif-plaintif. Pembeli-pembeli telah membeli satu hartanah daripada responden dan telah membayar harga belian penuh kepada responden. Walau bagaimanapun, responden gagal menyerahkan dokumen hak milik hartanah tersebut kepada pembeli-pembeli dan dengan itu, pembeli-pembeli memulakan guaman, yang menjadi hal perkara rayuan ini, untuk menggesa responden menyerahkan dokumen hak milik hartanah tersebut kepada pembeli-pembeli. Dalam guaman yang sama, responden mengeluarkan notis pihak ketiga terhadap perayu/pihak ketiga untuk menggesa perayu mengemukakan dan meyerahkan surat ikatan hak milik hartanah tersebut kepada pembeli-pembeli. Dalam tuntutannya terhadap perayu, responden menghujahkan bahawa pemilik tanah telah mengarahkan perayu menyerahkan kesemua hak milik dalam milikan perayu, sebagai peguamcara pemilik tanah, kepada peguamcara responden, yang mana perayu telah lakukan kecuali ke atas dua hak milik, salah satu daripadanya adalah surat ikatan hak milik asal bagi hartanah tersebut. Dalam pembelaan mereka terhadap notis pihak ketiga dan tuntutan oleh responden, perayu menghujahkan bahawa pemilik tanah telah menyimpan surat ikatan hak milik hartanah tersebut dengan perayu, yang merupakan peguamcara kepada pemilik tanah, sementara menunggu keputusan guaman ('OS') antara responden dan pemilik tanah. Oleh itu, adalah menjadi hujahan perayu bahawa perayu mempunyai lien peguamcara terhadap surat ikatan hak milik sehingga fi guaman yang tertunggak dan terhutang kepada perayu oleh pemilik tanah diselesaikan sepenuhnya. Perayu kemudiannya memfailkan saman interplider memohon, antara lain, suatu perintah bahawa responden membayar fi guaman untuk membolehkan pelepasan lien peguamcara perayu ke atas surat ikatan hak milik tersebut. Saman interplider tersebut ditolak oleh Timbalan Pendaftar dan tidak ada rayuan terhadap keputusan tersebut. Isu-isu yang perlu diputuskan dalam rayuan ini adalah: (i) sama ada perayu mempunyai lien peguamcara ke atas dokumen hak milik; dan (ii) sama ada perayu diestop daripada menuntut lien peguamcara terhadap lien peguamcara ke atas dokumen hak milik dan dengan itu *res judicata* terpakai kepada perayu berikutan keputusan Timbalan Pendaftar menolak saman interplider perayu.

Diputuskan (membenarkan rayuan dan mengenepikan perintah Mahkamah Tinggi dengan kos)
Oleh Abdul Aziz Rahim HMR menyampaikan penghakiman mahkamah:

(1) Perayu boleh menuntut lien peguamcara ke atas surat ikatan hak milik kepada hartanah tersebut yang dalam milikan mereka. Itu adalah satu-satunya cara perayu boleh melindungi kepentingannya berkaitan dengan bayaran fi guamannya oleh pemilik tanah bagi perkhidmatan yang diberikan kepada pemilik tanah atas permintaan pemilik tanah khususnya berkaitan dengan OS. Lebih-lebih lagi apabila surat ikatan hak milik masih berdaftar atas nama pemilik tanah. Responden tidak memaksa pemilik tanah menyerahkan surat ikatan hak milik walaupun ia menyatakan bahawa OS telah diselesaikan secara baik dan, dalam ketiadaan hujahan mematahkan oleh responden, ia sudah pasti benar.

(2) Di sisi *common law*, seseorang peguamcara mempunyai hak atau lien untuk mengekalkan hartanah dalam milikannya sehingga dia dibayar kos yang dihutang kepadanya dalam kapasiti profesionalnya. Peruntukan dalam s. 55 Ordinan Peguam Bela (Sabah Bab 2) juga membenarkan seseorang peguamcara di Sabah untuk mempunyai lien terhadap dokumen hak milik kepunyaan anak guamnya sehingga fi guamannya diselesaikan sepenuhnya. Hakim bicara, atas kegagalan mempertimbangkan fakta-fakta ini, telah terkhilaf dalam keputusannya bahawa perayu tidak boleh menuntut lien peguamcara terhadap surat ikatan hak milik kepada hartanah tersebut. (*Zulpadli & Edham v. Inai Offshore & Marine Engineering Sdn Bhd*, diikuti)

(3) Tidak ada keputusan atas merit tuntutan perayu terhadap lien peguamcara atas surat ikatan hak milik yang dibuat oleh Timbalan Pendaftar dalam menolak saman interplider perayu. Oleh itu, yang arif Hakim Mahkamah Tinggi telah terkhilaf apabila beliau memutuskan bahawa perayu tidak boleh menuntut lien peguamcara terhadap surat ikatan hak milik kepada hartanah tersebut kerana ia adalah *res judicata* disebabkan oleh keputusan Timbalan Pendaftar.

(4) Arahan yang diberikan oleh pemilik tanah kepada peguamcara mereka, perayu, untuk melepaskan surat ikatan hak milik, tidak membebaskan pemilik tanah daripada kewajipannya untuk membayar kepada perayu, fi guaman dan kos perbelanjaan bagi

perkhidmatan yang telah diberikan. Adalah undang-undang matan bahawa seseorang peguamcara berhak untuk mempunyai lien terhadap dokumen-dokumen anak guamnya sehingga fi guaman dan kosnya dibayar sepenuhnya. Selanjutnya, lien peguamcara yang dituntut oleh perayu atas surat ikatan hak milik adalah bersifat pemilikan dan dengan itu, perayu akan kehilangan pemilikan ke atas surat ikatan hak milik jika perayu melepaskan surat ikatan hak milik tersebut seperti yang diarahkan oleh pemilik tanah.

(5) Perayu tidak pernah menjadi pihak kepada perjanjian atau surat ikatan penyerahhakan antara pemilik tanah dan pemaju atau perjanjian jual beli di antara defendan dan pembeli-pembeli. Tanpa apa-apa priviti kontrak antara perayu dan responden, responden tidak mempunyai hak untuk menuntut pengemukaan dan milikan surat ikatan hak milik kepada hartanah tersebut. Dengan itu, responden tidak mempunyai kausa tindakan terhadap perayu bagi pelepasan dan penyerahan surat ikatan hak milik kepada hartanah tersebut. Walaupun terdapat arahan oleh pemilik tanah kepada perayu untuk melepaskan surat ikatan hak milik tersebut, responden tidak boleh bersandarkan pada arahan tersebut semata-mata untuk membawa kausa tindakan terhadap responden kecuali jika pemilik tanah juga dinamakan sebagai pihak dalam tuntutan terhadap perayu.

Case(s) referred to:

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Lee Tee & Anor v. Seek Loi Neo & Anor [2000] 2 CLJ 761 CA ***(refd)***

Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd [2011] 5 CLJ 866 CA ***(refd)***

Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(refd)***

TR Hamzah & Yeang Sdn Bhd v. Lazar Sdn Bhd [1985] 1 CLJ 72; [1985] CLJ (Rep) 312 FC ***(refd)***

Zulpadli & Edham v. Inai Offshore & Marine Engineering Sdn Bhd (In Liquidation) [2011] 6 CLJ 47 CA ***(foll)***

Legislation referred to:

Advocates Ordinance (Sabah Cap. 2), s. 55

Rules of the High Court 1980, O. 17 r. 3, O. 32 r. 1, O. 92 r. 4

For the appellant - Roland Cheng; M/s Roland Cheng & Co

For the respondent - Brendan Soth; M/s Ronny Cham & Co

[Appeal from High Court, Kota Kinabalu; Suit No: K22-156-2009-III]

[Editor's note: For the High Court judgment, please see Wong Foh Hin & Anor v. Konkamaju Sdn Bhd [2010] 1 LNS 1621.]

Reported by S Barathi

JUDGMENT

Abdul Aziz Rahim JCA:

Introduction

[1] On 15 November 2011 Justice Abdul Rahman Sebli, judge of the High Court of Sabah and Sarawak sitting at Kota Kinabalu allowed the respondent's (ie, the defendant before the High Court) claim against the appellant (ie, the third party before the High Court) for an injunction to compel the appellant to produce and deliver the title country lease No. 215398557 ('the title deed') to the plaintiffs (who are the purchasers in the action and the plaintiffs before the High Court but not a party to this appeal) within 30 days from the date of the order with cost to be taxed between the plaintiffs and the defendant in the High Court. The learned High Court Judge also allowed the respondent's claim that the respondent be fully indemnified by the appellant against liability in respect of the first and second plaintiff's claim for costs and damages, if any.

[2] The reason given by the learned High Court Judge is that the plaintiffs have the right of possession over the document of title and it is the defendant's responsibility to deliver the same to the plaintiffs as stipulated in cl. 11 of the sale and purchase agreement. The learned High Court Judge also said that it is no defence for the defendant to say that the title is in the possession of the third party or that the plaintiffs have full knowledge of this fact. The learned judge also allowed the defendant's third party claim on the ground that the third party cannot claim a solicitor's lien over the Deputy Registrar's decision dated 6 August 2010 and that it is not the defendant's duty to discharge the solicitors lien of the third party over the document of title.

[3] This is the third party's appeal against that decision. In this appeal the appellant shall be referred to as the 'third party' and the respondent as the 'defendant' unless otherwise stated. Reference to 'plaintiff' is a reference to the plaintiff in the action before the High Court.

[4] On 17 May 2012, having heard counsel and having read the appeal records we allowed the third party's appeal with cost of RM10,000 to the appellant ie, the third party and set aside the High Court Order dated 15 November 2011.

Facts Of The Case

[5] The plaintiffs were and at all material times the legal and beneficial owners of Lot No. 3 Block 34B, Bandar Penampang Phase 2b, Mile 5 ½ Penampang Road Kota Kinabalu, Sabah ('the property') held under the original document of title deed. The plaintiffs had purchased the property from the defendant pursuant to a sale and purchase agreement ('the said sale and purchase agreement') dated 19 December 2003. The purchase price for the property was RM405,000 and the plaintiffs have paid the purchase price to the defendant in full.

[6] At all material times the defendant was a company registered in Malaysia with its registered address at Wisma Damai Kota Kinabalu and was carrying on a business as land developer.

[7] In it's statement of claim against the third party, the defendant claimed that it was a joint venture partner of Syarikat Batu Bata Koidupan Sdn Bhd ('the landowner') by virtue of a JV agreement dated 2 May 1992 ('the JV agreement'). The defendant further claimed that by virtue of the JV agreement and a deed of assignment dated 30 March 2000 ("the deed of assignment") the defendant was entitled to sell the property to the plaintiffs. The defendant also averred that by letters dated 9 May 2003 and 13 May 2003 respectively ('the letters'), the landowner instructed the third party to release all the titles (36 titles all together including the original title deed to the property) held by the third party as solicitors for the landowner, to Messrs Ronny Cham & Co the defendant's solicitors. The defendant alleged that the third party released all the titles except two. One is the original title deed to the property. The other is the original title deed under country lease No. 215398682 to Lot No. 11 Block 35 Bandar Penampang

Phase 2b, Mile 5 ½ Penampang Road Kota Kinabalu. The defendant contends that the plaintiffs were aware that the title deed to the property was in the possession of the third party prior to the commencement of the plaintiffs' action against the defendant by virtue of a letter dated 16 July 2009.

[8] The third party was at all material times a firm of advocates and solicitors carrying on the profession as advocates and solicitors at Kota Kinabalu, Sabah. In their defence to the defendant's third party's notice and claim, the third party denied any knowledge of any sale and purchase agreement between the defendant and the plaintiffs for the property or of any dispute between the two. The third party pleaded facts are that:

(a) there was a suit pending before the High Court at Kota Kinabalu Sabah in the form Originating Summons No. K24-296-2002 ('the said OS') between the defendant and the landowner, and that the JV agreement and the deed of assignment were the subject matter in the said suit. The third party alleged that the deed assignment was executed without the consent of the landowner, therefore not binding on the landowner;

(b) the third party was the landowner's solicitors in the said OS and landowner had deposited the title deed to the property with the third party pending resolution of the said OS;

(c) On 8 August 2003 the High Court at Kota Kinabalu, on application by the landowner in the said OS, had ordered a stay of all further proceedings in the said suit and directed the matter to be referred for arbitration. However the defendant failed or refused to proceed with arbitration;

(d) the landowner was informed that legal fees were owing to third party and that the third party had agreed with the landowner to reduce the balance of legal fees due and owing to a sum of RM15,000;

(e) the letters are matters strictly between the third party and the landowner and are privileged from disclosure. By virtue of the letters also the defendant was aware and knew that there are legal fees due and owing to third party by the landowner; and

A (f) the legal ownership of the property is still in the name of the landowner. Therefore if the defendant wants the title deed, the defendant should pay the outstanding legal fees of RM15,000 owing and due to the third party by the landowner because the third party as solicitors for the landowner has
B solicitor's lien over the title deed until the legal fees are fully paid.

[9] On those pleaded facts, it is the third party's defence that defendant is mere busybody and has no *locus* to maintain the
C action against the third party.

[10] On or about 25 May 2010, the third party filed an interpleader summon pursuant to O. 17 r. 3, O. 32 r. 1 and O. 92 r. 4 of the Rules of the High Court 1980 ('RHC') by way of
D summon in chambers in encl. 52 (p. 14 appeal record vol. 1 part A). In the application the third party sought, *inter alia*, an order that the defendant pay the third party legal fees of RM20,099.18 in order to discharge the third party solicitors lien on the title deed to the property within 14 days from the date of the court
E order. The application was supported by an affidavit by one Cheng Ho Wah @ Roland, one of the partners in the third party legal firm (p. 218 appeal record vol. 2 (part A)). In the affidavit in support the said Cheng Ho Wah @ Roland deposed, *inter alia*, as follows:

F 3. This action is brought by the plaintiff against the defendant *inter alia* to recover the possession of the title deed held under CL215398557. However, the Third Party has a solicitor lien against the Title Deed held under CL215398557 arising from the Originating Summons No. 24-296 of 2002
G between the defendant and Syarikat Batu Bata Koidupan Sdn. Bhd. The matter was referred to arbitration by his Lordship Datuk Sulong Bin Matjeraie on 20th August 2003 but the defendant never did so. The Third Party was the solicitor acting for Syarikat Batu Bata Koidupan Sdn Bhd in that matter and therefore exercised a solicitor lien over the Title
H Deed CL215398557 for legal fees of RM20,099.18 as at 19th May 2010. The sum of RM20,099.18 as at 19th May 2010 is made up of the legal fees of RM15,000.00 together with interest of 8% from 16 February 2006 until 19th May 2010. The Third Party has informed the defendant through
I their solicitor dated 17th February 2006 that they are exercising their solicitor lien over the Title Deed. However the defendant refused to pay the Third Party solicitor's fees.

...

4. The Title Deed held under CL215398557 is registered in the name of Syarikat Batu Bata Koidupan Sdn Bhd and was given to the Third Party as a result of the action filed by the defendant against Syarikat Batu Bata Koidupan Sdn Bhd in Originating Summons No. 24-296 of 2002. The Third Party's client Syarikat Batu Bata Koidupan Sdn Bhd have not settle the legal fees of the Third Party. This was informed to the defendant but they have also failed, refused and or neglected to do so.

   A true copy of the letter dated 17th February 2006 to Syarikat Batu Bata Koidupan Sdn Bhd, letters dated 17th February 2010 and 25th April 2006 to Messrs Ronny Cham & Co, letter dated 11th August 2008 to Messrs Ngui & Associates are now shown to me and annexed hereto marked "CHW-2".

5. Accordingly I verily believe that the defendant has no cause of action against the Third Party claimed by the plaintiff but I have received a claim from the defendant threatening to take actions including injunction against the Third Party unless the Third Party delivers up the Title Deed CL215398557.

6. I have received a copy of the Statement of Claim of the plaintiff against the defendant which showed at Paragraph 3 that the defendant executed a Sale and Purchase Agreement dated 19th December 2003 which was nearly four months after the Order dated 20th August 2003 in Originating Summons No. 24-296 of 2002 dated 20th December 2002. Therefore the defendant had knowingly entered into the agreement with the plaintiff after they knew that were under a liability to the third party.

   A true copy of the Statement of Claim dated 30th July 2009 from Messrs Ngui & Associates is now shown to me and annexed hereto marked "CHW-3".

7. I claim no interest in the subject matter in dispute namely the Title Deed held under CL215398557 other than the sum of RM20,099.18 for the Third Party legal fees arising from Originating Summons No. 24-296 of 2002. I do not in any manner collude with the plaintiff.

8. I am ready and willing to comply with the order of this Court as to custody of the Title Deed held under CL215398557 provided my legal fees of RM20,099.18 is first paid by the defendant and the costs of this application is also paid by the defendant.

[11] The application was opposed by the defendant. In the defendant's affidavit in opposition affirmed by one Kong Hui Chieng opposing the application, the deponent of the affidavit deposed, *inter alia*, as follows:

> 3. On a point of preliminary objection, I am advised by the defendant's Solicitors and I verily believe that the Third Party's application under Order 17 r. 3 RHC 1980 is misconceived in that the Third Party has no right of claim for any charges or costs in the subject matter as dispute between the plaintiff and the defendant.
>
> 4. Notwithstanding the above preliminary objection, I have been further advised by the defendant's Solicitors and I verily believe that the Third Party's claim of solicitor's lien against the Title Deed under CL No 215398557 is misconceived, vexatious, frivolous and scandalous and otherwise an abuse of the process of the Court in that:
>
> a. By his own admission the subject matter of his claim, if any, did not arise from the subject matter between the plaintiff and the defendant but arose from the Originating Summons No. 24-296 of 2002 between the defendant herein as the plaintiff and one Syarikat Batu Bata Koidupan Sdn Bhd ["BBK"] as defendant, on behalf of whom the Third Party acted as Solicitors;
>
> b. By his own admission the Third Party's solicitors' fees, if any, is owned by BBK and not the defendant;
>
> c. By his own admission, his claim for solicitors' fees in respect of the matter of Originating Summons No. 24-296 of 2002 against BBK, even if allowable under O 17, r 3 RHC 1980, such claim is time barred;
>
> d. The Third Party has deliberately and with bad faith and intent withheld material facts from this Honourable Court by concealing the fact that the said Originating Summons No. K24-296 of 2002 had been settled amicably out of court between the defendant and BKK and by BBK's letters dated 9th May 2003 and 13th May 2003 respectively, BBK, the Third Party's clients, have instructed the Third Party as their Solicitors to release amongst other titles, the said Title Deed held under CL No 215398557 to Messrs Ronny Cham & Co as solicitors for Aggasf Properties Sdn Bhd, the joint

venture partner of BBK whilst the defendant is the assignee thereof. By his own letter dated 12th May 2003 addressed to BKK, the Third Party did not at all raise any issue of solicitors' lien. A copy each of BKK's aforesaid letters and the Third Party's letter is now produced and shown to me marked "KCH-1", "KCH-2" and "KCH-3".

e. The Third Party has no right of claim for any fees even against BBK as there was neither any agreed bill of such legal fees between BBK and the Third Party nor any taxed bill ordered by the Court.

[12] However, having heard the parties on the interpleader summons, the Deputy Registrar of the High Court at Kota Kinabalu dismissed the application on 6 August 2010 and there is no appeal against this decision. What this means is that, the defendant is not liable to pay the third party the outstanding legal fees due and owing to the third party by the landowner.

[13] It is pertinent to note that exh. KCH1 exhibited in the defendant's affidavit in opposition is a letter dated 9 May 2003 by the landowner (who is also the defendant in the said suit) instructing the third party to release the titles to Aggasf Properties Sdn Bhd and not to the defendant though the titles were to be released through the legal firm of Messrs Ronny Cham & Co, the defendant's solicitors. In exh. KCH2 the third party wrote to the landowner on 12 May 2003 seeking confirmation and further instruction on the matters raised in the landowner's letter in exh. KCH1. Responding to that letter, the landowner wrote another letter exh. KCH3 to the third party dated 13 May 2003 in which the landowner maintained and confirmed their earlier instruction to release the titles to Aggasf Properties Sdn Bhd through the defendant's legal firm.

[14] It is also to be noted that the title under the original title deed to the property, and the original title deed under country lease No. 215398682 to lot No. 11 Block 35 Bandar Penampang Phase 2b, both situated at Mile 5 ½ Penampang Road Kota Kinabalu, Sabah are not the subject matter of the said OS between the defendant and the landowner. (see letter dated 18 June 2003 by third party to legal firm Messrs Ronny Cham & Co at p. 45 appeal record vol. 1 part A). In the said OS the defendant

was the plaintiffs and the landowner was the defendant and the said OS was filed on or about 20 December 2002; and was amended pursuant to a court order on 23 July 2003. The letter by the third party to Messrs Ronny Cham & Co was therefore written after the OS had been filed.

[15] Pursuant to the instruction by the landowner, the third party did, by letter dated 17 May 2003 (p. 43 appeal record vol. part A), forwarded to the legal firm of Messrs Ronny Cham & Co as solicitors for the defendant all the 36 titles except title deed No. CL215398597 (sic) and CL215398662.

[16] It is also apparent that with regard to the title Deed No. CL215398597 to the property, there was some discussions between the landowner and the third party. This is evident from the letter dated 17 February 2006 (at p. 69 appeal record vol. 1 part A) from the third party to the landowner. In the letter, the third party referred to the said OS and the telephone conversation on 27 January 2006 with one Yusuf Razak and Kong Su Bin of the landowner. Together with the letter the third party also enclosed a letter dated 25 January 2006 from the legal firm of Messrs Ronny Cham & Co requesting for the release of the title deed No. CL215398662. At the same time the third party also informed the landowner that the original title deed was in their possession and they are claiming lien on it until their fees and disbursement in the sum of RM15,000 are paid. On the same date 17 January 2006 the third party also wrote a letter (at p. 70 appeal record vol. 1 part A) to Messrs Ronny Cham & Co informing them that no instruction have been received from their client the landowner and that the third party have a lien on the original title deed CL215398682.

Our Opinions

[17] There are two main issues in this appeal. The first issue is whether the third party has a solicitor's lien over the document of title. The second issue is whether the third party is estopped from claiming a solicitor's lien over the document of title and accordingly *res judicata* applies to the third party in the light of the Deputy Registrar's decision dated 6 August 2010 dismissing the third party's interpleader summons.

[18] On the first issue the third party contended that the third party was engaged by the landowner as their solicitors to act in

the said OS. The third party further contended that pending the resolution of the said OS, the landowner deposited the title deed for the property with the third party. It is undisputed fact that the landowner owe the third party a sum of RM15,000 as legal fees in relation to the said OS.

[19] The plaintiffs had paid the full purchase price of the property to the defendant. But the defendant has failed to deliver the document of title to the property to the plaintiffs. Hence the plaintiffs commenced the suit (Suit No. K22-156-2009 III) the subject matter of the present appeal to compel the defendant to deliver the document of title to the property to the plaintiffs. In the same Suit, the defendant took out a third party notice against the third party to compel the latter to produce and deliver the title deed to the property to the plaintiffs and to indemnify the defendant for any loss against liability in respect of the plaintiffs claim against the defendant in the suit.

[20] From the exchange of correspondences between the third party and the legal firm of Ronny Cham & Co, and correspondences between third party and Messrs Ngui & Associate, solicitors for the plaintiffs and correspondences between Messrs Ronny Cham & Co and Messrs Ngui & Associate it appears that Messrs Ronny Cham & Co had demanded on 24 April 2006 from the third party for the delivery of the title deed to the property. However the third party had written to Messrs Ronny Cham & Co on 25 April 2006 (at p. 71 appeal record vol. 1 part A) reiterating that the third party were only exercising solicitor's lien on the title deed for outstanding legal fees from the landowner. However in their letters and correspondences, the third party had referred to title deed No. CL215398682, not title deed No. CL 215398597. We are of the view that the reference to the title deed No. CL215398682 instead of title deed No. CL 215398597 is an inadvertent typographical error. We think so because firstly the caption in all the letters written by Messrs Ngui & Associate, solicitors for the plaintiffs, the property has been described as Lot 3, Block 34B, Bandar Penampang Phase 2BG,(held under CL215398557, Penampang). Likewise the caption in all correspondences by the third party to Messrs Ngui & Associate also referred to the same property. Secondly, in the schedule to the sale and purchase agreement dated 19 December 2003 (at p. 100 appeal record vol.

A 1 part A) between the defendant, the landowner and the plaintiffs as purchasers, the purchased property was likewise described. Thirdly, the original title deed to the property, (at pp. 88-91 appeal record vol. 1 part A), also bear the same title No. of CL 215398557.

B

[21] The third party was never a party either to the sale and purchase agreement between the plaintiffs and the defendant or the deed of assignment or the JV agreement between the landowner and the defendant. This fact is not in dispute.

C

[22] Therefore the third party argued that it has a lien over the document of title because it obtained the custody of the title deed as a result of litigation and is entitled to have custody of the same pending settlement of his legal fees. The fact that the third party was engaged by the landowner in the said OS was not in dispute.

D

The third party letter dated 11 September 2003 (at p. 181 of the appeal record vol. 2) to the landowner is the evidence that shows the third party had billed the landowner for RM9,600 under a second interim bill (which is exhibited at p. 182 of the appeal record vol. 2). The third party also wrote two letters both dated

E

17 February 2006 addressed to the landowner (at p. 69 of the appeal record vol. 1 part A) and to the solicitors for the defendant (at p. 70 of the appeal record vol. 1 part A) stating that the third party is claiming a lien over the original title deed to the property for payment of legal fees and disbursement costs

F

in the sum of RM15,000. On 25 April 2006 the third party wrote another letter to Messrs Ronny Cham & Co, solicitors for the defendant in response to a demand for the delivery of the title deed to the property and reiterated that it could not do so because the third party is exercising a lien on the said title deed.

G

[23] This amount has not been paid by the landowner to the third party; and this fact is not disputed.

[24] For that reason the third party has claimed a solicitor's lien

H

over the title deed to the property which is in their possession. We are of the view that it can do so. That is the only way the third party can protect its interest with regard to the payment of its legal fees by the landowner for services rendered to the landowner at the latter request in particular in relation to the said

I

OS. This is particularly so when the title deed is still registered in

the name of the landowner. At this juncture we noted that third party had submitted that the defendant has not compelled the landowner to deliver the title deed even though it claimed that the said OS was amicably settled. There is no rebuttal of this submission by the defendant. So probably it must be true.

[25] At common law a solicitor has a right or lien to retain property in his possession until he is paid costs due to him in his professional capacity – see para. 226 *Halsbury's Laws of England* vol. 44 (4th edn.). In the same volume of *Halsbury's Laws of England*, at para. 229 the following passage is found:

> A solicitor having a retaining lien over property in his possession is entitled to retain the property as against the client, and all persons claiming through him and having no better right than the client, until the full amount of the solicitors taxed costs payable by the client is paid.

[26] Sabah's Advocates Ordinance (Sabah Cap. 2) also contain s. 55 which reads:

> Except by way of securing his first to a lien, an advocate shall not otherwise withhold the client's papers to the detriment of the client.

[27] Though s. 55 of the Ordinance does not expressly refer to solicitor's lien over a property in possession of a solicitor, instead speaks only of withholding client's papers; we are of the view that the provision is sufficiently wide to allow a solicitor in Sabah to have a lien over a document of title belonging to a client until his legal fees are fully paid.

[28] In *Zulpadli & Edham v. Inai Offshore & Marine Engineering Sdn Bhd (In Liquidation)* [2011] 6 CLJ 47; [2011] 4 MLJ 161, this court (comprising of different panel) recognises that at common law a solicitor has a right to retain a client's document and property pending payment of the solicitor's bill. At para. 11 p. 56 (CLJ); p. 167 (MLJ) of the law report, the court speaking through the judgment of Jeffrey Tan JCA (as he then was) explained this principle as follows:

> [11] Certainly, at common law a solicitor has a right to retain a client's document and property pending payment of the solicitor's bill. A 1950 English case, *Barratt v. Gough - Thomas*, cited at [1950] 2 All ER 1048, and followed in

A Canada (in *White Resource Management Limited v. Durish* (1997) 154 DLR (4th) 158, used these words: "The nature of a solicitor's general retaining lien has more than once been authoritatively stated. It is a right at common law depending, it has been said, on implied agreement. It has not the character of an encumbrance or equitable charge. It is merely passive and possessory, that is to say, the solicitor has a right of actively enforcing his demand. It confers on him merely the right to withhold possession of the documents or other personal property of his client or former client." From *Re Motherwell* (1927) 62 DLR 130 (Ontario Supreme Court): 'The right of a solicitor to a lien on the documents of his client which come to his hands in the course of his employment is a well recognised right, and one which ... is for the benefit of clients as it often enables or induces solicitors to carry on proceedings for the client which they might otherwise be unwilling to do; but it is a right which is subject to certain qualifications.' 'The right of a solicitors in documents in his possession cannot exceed that of his client, and if third persons have a joint interest in them, or for any other cause have a right to call on the client to produce them, the lien of the solicitor cannot debar them of that right. 'The solicitor's lien creates no charge upon the property, if any, to which the documents relate, it is not like an equitable mortgage by deposit; the lien is merely a passive right of retainer, and cannot be actively enforced as in the case of other liens. So long as it exists it has been held that the solicitor can withhold the documents from inspection by his client, or anyone claiming under him; although it has been held that the client can by *subpoena duces tecum* served on the solicitor compel him as a witness to produce them in evidence in support of the clients case.

[29] The learned judge in this instant appeal had not considered the above authorities in his judgment. In our view if he had considered the said authorities in his decision it could have been otherwise. On the same authorities we hold the view that the learned judge was wrong in his ruling that the third party cannot claim solicitor's lien over the title deed to the property.

[30] On the second issue, the learned High Court Judge had ruled that solicitor's lien is not available to the third party because it is *res judicata* by virtue of the Deputy Registrar dismissing the third party's interpleader summons on 6 August 2010.

[31] The third party interpleader summons or application was made pursuant to O. 17 r. 3 of the RHC 1980 by way of summons in chambers in the suit. In the application the third party seeks an order that the defendant to pay the third party legal fees of RM20,099.18 as at 19 May 2010 to discharge the third party solicitor's lien on the title deed to the property. But the application was dismissed by the Deputy Registrar on the ground that the defendant is under no liability to make payment to the third party or any other person and that there is no real foundation for the expectation of a rival claim – (see the Deputy Registrar's grounds of decision at pp. 256-263 of appeal record vol. 3 part B & C). Reading the grounds of decision by the Deputy Registrar in dismissing the third party's interpleader summons it appears that the learned Deputy Registrar never considered the issue whether the third has rightly claim a lien on the title deed to the property. This issue was never decided.

[32] In the case of *Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd* [2011] 5 CLJ 866; [2011] 6 MLJ 788, cited by learned counsel for the third party it was said at p. 876 (CLJ); p. 789 (MLJ) that "a dogmatic approach in applying a *res judicata* principle would be unjust to the respondent who did not have a full and fair opportunity to litigate the issue. This factor must be made before *res judicata* could be binding on the parties. It is founded on justice and common sense."

[33] On the other hand, the Court of Appeal in *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 MLJ 57, had said that "Once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened. Although the first decision was made on an interlocutory matter which was purely procedural in nature, it was nevertheless binding on the court and all parties to the *lis* until its reversal on appeal." Likewise in *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553; [2000] 1 MLJ 479, another Court of Appeal had said that "A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit. Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication.

[34] In present case however, there was no decision on the merits of the third party claim of solicitor's lien on the title deed being made by the Deputy Registrar in dismissing the third party's interpleader summons. Though in the excerpts of the affidavits by the third party and the defendant filed in the interpleader summons (as quoted in earlier part of this judgment) the issue of solicitor's lien on the title deed was averred to, this was not discussed or referred to in Deputy Registrar's ground of decision. In other words, the merits of the solicitor's lien as claimed by the third party was never at any stage determined by the court. Therefore, it is our view that the learned High Court Judge had fallen into error when he concluded that the third party cannot claim a solicitor's lien over the title deed to the property as it is *res judicata* by reason of the Deputy Registrar's decision dated 6 August 2010.

[35] As for the defendant, it was argued before us that the third party should have released the title deeds to Messrs Ronny Cham & Co, the defendant's solicitors because it is uncontroverted fact that the third party's own client the landowner had instructed the third party to release all the 36 title deeds (which include the title deed to the property). This is evidence in exhs. D5 and D7 at pp. 40 and 42 respectively of the appeal record vol. 1 part A.

[36] However, we are not persuaded by this argument. In our view the instruction given by the landowner to their solicitors the third party to release the title deeds does not absolve the landowner's obligation to pay the third party its legal fees and disbursement cost for services rendered. As the law stands, a solicitor is entitled to have a lien on his client documents until his legal fees and costs are paid in full.

[37] We observed that on 20 August 2003, the High Court at Kota Kinabalu had made an order on application by the defendant that all proceedings in the said OS be stayed and the matter be referred to arbitration in accordance with cl. 15 of JV agreement.

[38] But the arbitration did not proceed. It appears that the parties had come to a settlement on the said OS resulting in the instruction by the landowner to the third party to release the title deeds including the title deed to the property to the solicitors for the defendant.

[39] It is to be noted that the solicitor's lien claimed by the third party on the title deeds is possessory in nature. In *TR Hamzah & Yeang Sdn Bhd v. Lazar Sdn Bhd* [1985] 1 CLJ 72; [1985] CLJ (Rep) 312; [1985] 2 MLJ 45, FC it was said "... that a solicitor lien possessory lien is lost if the solicitor parts with the possession of the deeds without making any reservation. It also seems plain that the lien is preserved if the solicitor obtains the agreement of the recipient that he will hold the deeds on the solicitor's behalf."

[40] Therefore, on the facts and circumstances of this case, the third party would have lost its possessory lien on the title deeds to the property if the third party is to part with the title deed as instructed by the landowner.

[41] For the above reasons, we allowed the appeal and set aside the High Court order with costs of RM10,000 awarded to the third party/appellant.

[42] Before we sign off, we would like to say something on two other related issues raised in the submission by counsels in this appeal. The first one is the issue on privity of contract between the third party and the defendant. As we have said earlier, the third party is never a party to the JV agreement or the deed of assignment between the landowner and the developer or the sales and purchase agreement between the defendant and the plaintiffs. In this regard, we think learned counsel for the third party is correct to submit that in absence of any privity of contract between the third party and the defendant, the defendant has no right to demand the production and custody of the title deed to the property. We think the defendant has no cause of action against the third party for the release and surrender of this title deed to the property. There is of course evidence to show that the landowner (ie, the third party client) had instructed the third party to release the title deed. But that is between the landowner and the third party. The defendant cannot ride on the instruction by the landowner to its client to release the title in order to have a cause of action against the third party unless the landowner is also named as a party to the claim against the third party.

[43] The second issue is that of limitation. It was submitted for the third party that the defendant's claim is time barred under Item 37 (which limitation is three years from the date of the cause

of action) of the Schedule to the Sabah Limitation Ordinance or alternatively under Item 97 (period of limitation is six years) of the same. It was argued that the defendant's solicitors were aware that the third party has custody of the title deed to the property on 20 August 2003 and this knowledge, it was contended is imputed to the defendant. (see *Lee Tee & Anor v. Seek Loi Neo & Anor* [2000] 2 CLJ 761; [2000] 1 MLJ 466). This action was filed in 2011 and therefore by virtue of either Item 37 or alternatively Item 97 of the Schedule to the Sabah Limitation Ordinance, the defendant's claim is time barred. In this regard, and bearing in mind our view in the preceding paragraph that the defendant had no cause of action against the third party for want of privity of contract, we agree with the submission by learned counsel for the defendant that the argument on limitation is inapplicable in this case.

[44] Order accordingly.